Supreme Court, U.S.
FILED
NOV 19 1996
CLERK

No. 96-436

In The

Supreme Court of the United States

October Term, 1996

MARTIN MEYER WEISS,

Petitioner

v.

MARSHA NADEEN WEISS,

Respondent

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California Second Appellate District

REPLY TO BRIEF IN OPPOSITION

Martin M. Weiss
In Propria Persona
6345 Daylight Drive
Agoura Hills, CA. 91301
(818) 879-5008
Petitioner

RECEIVED
NOV 19 1996
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS

Page

Respondent's attorney concedes that the attorney hired for the petitioner refused to pursue his issues.....1

Respondent's attorney admits that the fees taken from the petitioner financed the respondent's action in the religious upbringing dispute.....4

Respondent's attorney is incorrect when he informs this Court that there is a "woeful lack" of evidence of harm to the child from being raised into two religions.....5

Respondent's assertion that petitioner sought unreasonable restrictions on respondent's religious activities with the child is incorrect.....5

Respondent's attorney is incorrect as to the reasonableness of the attorney fee awards.....6

Respondent's attorney fails to refute evidence that contributory attorney fees from separate property are gender discrimination, and a taking.....6

Respondent misstates the issue in this petition.....7

Respondent's claim that the Religious Freedom Restoration Act raises the threshold for the standard harm that must be met before a religious upbringing restriction may be made by a court, is in error.....8

Request for privacy.....10

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner, Martin Weiss, respectfully replies to Respondent's Brief in Opposition to petition for a Writ of Certiorari to review the order of the California Court of Appeal, Second Appellate District, Division Three.

1. Respondent's attorney concedes that the attorney hired for the petitioner refused to pursue his issues.

Respondent's attorney admits that the attorney hired for the petitioner "refused to pursue" the petitioner's goals. (Opposition Brief, page 7). He excuses this refusal by arguing that pursuit of the petitioner's goals would have been a waste of petitioner's time and money. (Opposition Brief, p. 8).

That as a direct consequence of the imposition of contributory attorney fees, the petitioner was without the wherewithal to finance and direct his own legal efforts, is the linchpin of this petition. The statement of the respondent's attorney now leaves as the only remaining factual issue the question of whether the petitioner's issues were reasonable.

At deposition on August 19, 1992, the respondent admitted that she had feigned her conversion to the Jewish faith of the petitioner, to induce the marriage. The petitioner sought to have the fraudulent conversion of the respondent to the petitioner's faith pursued, to argue for the implementation of the psychiatric evaluator's custody recommendations, and to argue for possible annulment, rather than dissolution. The attorney hired for the petitioner refused, stating that under the First Amendment, one can convert to any religion one chooses, as often as one wishes, for any reason she chooses, and that as California was a no-fault state, fraud was irrelevant. The Petitioner's attorney's position mirrored that of the Respondent. (CT V2, p.247, line 23-26). At trial, the respondent again admitted that she had feigned her conversion to the Jewish faith. (RT p242 line 19 to p244 line 6; also CT V2, p247

line 26). The attorney again refused to pursue this line of questioning.

The petitioner sought to have evidence of harm to the child from his being indoctrinated into a second religion presented to the trial court. Such testimony was elicited from the respondent at deposition, on August 19, 1992. Despite instructions from the petitioner, the attorney hired for the petitioner failed to enter this testimony into the record, and failed to raise this line of questioning at trial. The attorney hired for the petitioner refused, stating that it was not harmful for a child to be raised into two religions.

The petitioner contacted an expert witness, Dr. Egon Mayer, who agreed to appear for the petitioner, to argue that it could be harmful for a child to be raised into two religions. The attorney hired for the petitioner refused to utilize this witness, stating that it was not harmful to raise a child in two religions. It was Dr. Mayer's work , which the *Zummo* Court misapplied, that formed the basis for the finding in *Zummo*. And it was upon *Zummo*, that the Appellate court in the current case overwhelmingly relied. The Appellate Court's reliance on *Zummo*, the *Zummo* Court's reliance on Dr. Egon Mayer's work, and Dr. Egon Mayer's letter to the petitioner, are found in the Petition for a Writ of Certiorari, beginning at the last line of page 11, and continuing to page 13.

The Trial Court itself found that the attorney hired for the petitioner "failed to exercise diligence", in neglecting to file a proposed statement of decision for over seven months. (RT, Augment to Transcript on Appeal, June 2, 1993, filed Oct 25, 1994, p8). Were it not for the willingness of the Appellate Court to hear this case without a statement of decision, that lack of diligence would have proved fatal to this case.

The petitioner respectfully submits that it would have been neither a waste of time nor a waste of money to provide evidence to the court that one's child is being harmed, nor a waste of time, nor a waste of money, that one has been defrauded, nor a waste of time, nor a waste of money, that the stated basis for public policy on an

important issue, is, to borrow a phrase form the respondent's attorney, "woefully lacking." It is certainly conceivable that if the courts below had this evidence, the findings and rulings from the courts below would be different.

And as regards the larger controversies in the case, specifically, the enforceability of religious upbringing agreements, and the threshold of harm to a child at which courts may act, if such issues were settled law, then raising such issues could be considered a "waste". However, if these issues were settled law, it is unlikely the John Marshall Law Review would have published the petitioner's review on the issue. And it is unlikely the Appellate Court would have taken the case, especially considering there was no statement of decision. And the Appellate Court's language hardly supports the respondent's attorney's assertion that this case is a "waste". The Appellate Court writes that the matter before it in this case is one of "constitutional dimensions". (Appendix, 1-12). It further writes that "Few aspects of the human condition can rival the emotional power of the combination of issues presented in this case." (Appendix p1-11). The Appellate Court also refers to these issues as a "troubling area of law" (Appendix, p1-11, footnote 4). Troubled issues are unsettled issues. Pursuit of clarification of unsettled issues is not a "waste".

Respondent's attorney's excuse to justify the lack of representation the petitioner had on these issues, does not withstand examination. This case was not properly litigated, to the detriment of the petitioner, and his child. That the case was not properly litigated, is a direct consequence of the improper application of an unconstitutional statute. The petitioner had a right to have his issues pursued, even if defeated. The petitioner suggests that the defeat of his issues and goals at trial may not be a reflection of the merit of his positions, but rather, the lack of any effective legal representation or presentation of those issues.

2. Respondent's attorney admits the fees taken from the petitioner financed the respondent's action in the religious upbringing dispute.

Respondent's attorney openly states in his opposition brief to this court that "The fee award against Martin is, in large part, what enabled Marsha to defend against Martin's attempt to violate her First Amendment right to raise Matthew with the religious orientation of her choice." (Opposition Brief, page 5).

As regards this petitioner seeking to violate the respondent's First Amendment rights, the court should be aware that the respondent feigned her conversion to Judaism (RT, p244) to induce the marriage, and signed an agreement "pledg(ing) to rear all children...in loyalty to the Jewish faith and its practices" (RT, 8/28/92, p212 and RT 8/28/92 at p242, and exhibit 2 at trial), upon which this petitioner relied (RT, p49).

As regards the contributory attorney fees, their only purpose was for the religious upbringing dispute. There was no property dispute, nor any custody dispute other than for the religious upbringing issue. Moreover, even though the respondent won a significant spousal support award, ($2,700 per month, plus $8,750 in "retroactive" spousal support, RT, 6/26/91, p22), she continued to live in the petitioner's house, with the petitioner, for an additional two years after the attorney fee awards were made. The only use and purpose for the fee awards was to finance her position in the religious upbringing dispute.

Respondent's attorney states "To enlist state intervention into religious upbringing issues, there must be a showing of "substantial likelihood of harm to the child". (Opposition Brief, page 5, line 26). It is curious then, that this state intervention, the imposition of attorney fees, was utilized in the religious upbringing dispute, to finance for the respondent the right to take the child "into marked heinous harm".(Respondent's Appellate Brief, p16).

3. Respondent's attorney is incorrect when he informs this court that there is a "woeful lack" of evidence of harm to the child from being raised in two religions.

The immediate issue before this court is not whether there is evidence of harm to the child in the record below, but whether the petitioner had the opportunity to present such evidence. The petitioner did testify at trial that the child was harmed being raised into a second religion (RT, p65). Testimony was elicited from the respondent at deposition, on August 19, 1992, that the child was harmed by being raised into a second conflicting religion. The attorney hired for the petitioner failed to include this in the record.

Significantly, however, the petitioner read a letter to the Appellate Court, at oral argument, from the respondent's attorney, dated March 23, 1994, detailing harm to the child from religious conflict. (audiotape by Appellate Court of oral argument of October 18, 1995). The Court then expressed its grave concern for the welfare of the child (audiotape by Appellate Court of oral argument of October 18, 1995), advised the petitioner to return to the trial court with this evidence, and thought this information significant enough to make reference to it in its published opinion. (Appendix 1-13, footnote 7). The assertions of the respondent's attorney to this court that there is "a woeful lack of evidence of harm" to the child from being raised into a second religion (Opposition Brief, page 5), and that "the fact (is) that there simply is no evidence of past, present, or future substantial harm to Matthew due to his dual religious upbringing" (Opposition Brief, page 8), are contradicted by his own writing.

4. Respondent's assertion that petitioner sought unreasonable restrictions on respondent's religious activities with the child is incorrect.

Respondent labels petitioner's position as being unreasonable. (Brief in Opposition, P 5). Petitioner sought enforcement of the recommendations of the Court-ordered neutral psychiatric custody evaluator, who allowed for "generous exposure" of the child to the mother's religion. (CT V.2 p241). By way of comparison, respondent's openly stated position is that she has the constitutional right to take the child into "marked heinous harm". (Respondent's Appellate Brief, page 16, line 6). It is not unreason- able for a

parent to seek to prevent the taking of his child into "marked heinous harm" by the other parent.

The petitioner has not sought to deny the respondent opportunity to expose the child to her religion. Respondent's attorney has conceded that no order prohibiting the child from attending church was sought, and that the petitioner thought it important that the child celebrate Christmas, and attend church, with the Respondent and Respondent's family. (Respondent's Brief to Appellate Court, p 9).

5. Respondent's attorney is incorrect as to the reasonableness of the attorney fees awards.

Contrary to respondent's attorney's assertion, (Opposition Brief, p7) , the trial court commissioner did not follow guidelines for determining the incomes of the parties, but rather speculated on what she thought the incomes should be. As is argued in the Petition for a Writ of Certiorari, p 8 - 11, her order was an abuse of discretion, and improper under California law.

6. Respondent's attorney fails to refute evidence that contributory attorney fees from separate property are gender discrimination, and a taking.

To this date, there is not a single case in California in which contributory attorney fees have been applied against the wife in a custody dispute. The respondent's attorney had every opportunity within his brief in opposition, to cite any such case. He could come up with none.

Under California law "The validity of an act is to be determined by its practical operation and effect, and not it's declared title or purpose..." *Frost v. Los Angeles,* 181 Cal 22, 183 P 342. In practical operation and effect, Cal. Family Code §2030, is applied in at least as discriminatory fashion, as was any poll tax, in any year, in any Southern state.

As regards contributory attorney fees being a taking, respondent's attorney fails to refute the arguments of petitioner in his Writ for Certiorari.

7. Respondent misstates the issue in this Petition.

Respondent clouds the issues in this case, by claiming that a main issue before this court is whether the trial court properly denied the petitioner's request to restrain the respondent from engaging the child in religious activities. (Opposition brief, p2).

While not objecting if the Court should choose to rule on these issues, the enforceability of antenuptial religious upbringing agreements, and the threshold of harm at which Courts may weigh the best interests of a child, over the First Amendment rights of a parent, are not the immediate issues before this Court. The petitioner does not request the Supreme Court to make a ruling on these questions, but rather only requests this court to permit a fair hearing on these issues in the state court. The imposition of fees from his separate property prevented the petitioner from presenting evidence of harm to the child and evidence refuting the validity of the conclusions upon which the lower court relied upon in setting its policy.

The questions presented in this case, the constitutionality of contributory attorney fees in a custody dispute, particularly within the context of a religious upbringing dispute, and the related issues of no-fault divorce, and child custody law, are more than enough for any single case.

The immediate issue before the court is quite straightforward. Are contributory attorney fees from separate property, in the context of no-fault divorce, in a custody dispute, a taking, or justifiable exercises of the police power of the state? As such, consideration of RFRA, to the particulars of this case, should be limited to the violations of the petitioner's First Amendment and RFRA rights, in having his assets seized by the state, to finance the

securing for the respondent of the legal right to take his child into another religion, and if she so desires, up to "marked heinous harm". The respondent, however, informs the Court that one of the two main issues before it is whether the orders the lower courts made on the religious upbringing dispute were proper. (Opposition Brief, page 2). *If* the Court is to consider this additional issue now raised by the respondent, the petitioner requests the Court consider accepting, to act as a supplemental brief, the article written by the petitioner, *The Enforceability of Religious Upbringing Agreements*, The John Marshall Law Review, Summer, 1992, Vol. 25, p655 - 725. Within the confines of the pages left in this reply brief, and within the confines of the 10 page limitation of a supplemental brief, the petitioner cannot adequately address the issue of the enforceability of religious upbringing agreements, and the issue of the threshold of harm at which courts should intervene in religious upbringing disputes. The petitioner believes the article to be concise, cogent, and lucid. It was cite checked, edited and published by a law review neutral to this controversy. Even the respondent's attorney referred to the article as scholarly. (CT, p246).

8. Respondent's claim that the Religious Freedom Restoration Act raises the threshold for the standard of harm that must be met before a religious upbringing restriction may be made by a court, is in error.

The RFRA states that government may substantially burden an individuals exercise of religion only if the application of that burden is in the furtherance of a compelling governmental interest, and is the least restrictive means of furthering that interest. The respondent argues that the language "compelling governmental interest" now requires that an even a higher degree of harm must be present before a Court may intervene. (Opposition Brief, p8-11). The Appellate Court, however, stated that the best interests of a child are a compelling governmental interest. (Appendix, p1-13).

Therefore, the respondent's claim that she has the right to take the child "to marked heinous harm" (Respondent's Appellate Brief, p16, line 6), based on the RFRA, should be refuted by this Court.

As regards Respondent's RFRA rights, her cause is based on an egregious fraud, a feigned conversion to another faith to induce a marriage. RFRA should not, and does not, protect fraud. Furthermore, as regards RFRA, her cause is not protected by the statute. It is not the government, but the respondent, who established the religious upbringing burden, when she feigned her conversion to Judaism, and committed to raising her children in the Jewish faith; and, as noted above, the Appellate Court established that the best interests of the child are a compelling governmental interest when it stated "Obviously, the prevention of harm to the child...is a compelling state interest" (Appendix, p1-13). Finally, RFRA states that the least restrictive means of furthering the compelling interest must be utilized. Least restrictive does not mean minimally restrictive, and in fact, from the very language of the statute, the burden applied may be a quite substantial e.g. §2000bb-1 (b)exception: "Government may substantially burden a person's exercise of religion only if.....it is the least restrictive means of furthering that compelling governmental interest""

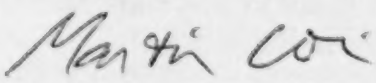
The respondent's attorney asks, "Is the appellant's right to Free Exercise of Religion being substantially burdened by the activity of another?" (Opposition Brief, p10). He commingles here the activity of the respondent, and the activity of the State. The State, in seizing from the petitioner $22,000, to finance the nullification of the religious upbringing agreement, and the taking of his child from his faith into another religion, causes the petitioner's labors to be turned against his own beliefs, in his own son. For the respondent's attorney to claim this is not a substantial burden, is disingenuous. It is very substantial, and even more painful. As for compelling governmental interest, the best interests of the child are such an interest. The successful promulgation of a fraud is not. Neither is the indoctrination of a child into another religion. And even if there was a compelling governmental interest , that burden was not applied via the least

restrictive means. Less restrictive means would be for the State to subsidize or loan funds for the respondent's legal efforts, or provide her legal representation.

* * *

The petitioner is concerned over attention that may be directed upon the child, who will be 12 in February, from the media, should the Court accept this case. The petitioner did seek to have the names of the parties omitted from the opinion published by the Appellate Court. This was opposed by the respondent (Opposition to Petition for Rehearing), and the Appellate Court refused to grant anonymity (Appendix-p1-17). Clearly, should this case be taken by the Court, anonymity would be futile, but any measures taken to decrease exposure would be appreciated. If feasible, and not felt improper, the petitioner requests the Court consider referring to this case by it's initials "W. v. W." Also, if feasible, and not felt improper, the petitioner requests the record below be sealed. The petitioner apologizes if these are improper requests, and hopes these requests do not discredit his work on this case.

Respectfully submitted,



Martin Weiss
In Propria Persona
6345 Daylight Drive
Agoura Hills, CA 91301
(818) 879-5008